

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
	)	

**REPLY COMMENTS OF CIENA CORPORATION**

**CIENA CORPORATION**

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## SUMMARY

In its initial comments in this proceeding, CIENA Corporation (“CIENA”) urged the Commission not to retreat from its policy of reducing or eliminating unbundling obligations for the incumbent carriers’ broadband facilities. In contrast, a very small number of commenting parties requested that the Commission reinstate unbundling obligations for the high frequency portion of copper loops (so-called line sharing) or for legacy hybrid loops. As detailed in these Reply Comments, those parties have failed to justify such an abrupt reversal of policy, particularly because that policy is working to encourage the deployment of advanced services.

First, there is no impairment without access to line sharing. A carrier can competitively enter the market for bundled voice and broadband services by line-splitting the whole loop in partnership with a voice provider using the lower portion of the loop, or simply by providing voice over Internet protocol services over the broadband facilities. In addition, the absence of impairment is demonstrated by the current degree of intermodal competition – cable modem service remains predominant, and wireless broadband and broadband over power line services have been viably deployed.

Second, other factors considered by the Commission reinforce the decision to eliminate line sharing as an unbundled network element. The arbitrary nature of any attempt to allocate costs between the low frequency and high frequency portions of the loop will distort competition. In addition, re-imposition of line sharing will dampen broadband investment, introduce inefficiency and create uncertainty.

Finally, the Commission should reject Covad’s request for unbundling of legacy hybrid loops. Because of the continuing need to invest in electronics to allow for advanced services to be carried over hybrid loops, reinstatement of unbundling obligations will still create investment

disincentives, even if the fiber feeder has already been deployed. Moreover, such an abrupt policy reversal would engender litigation and uncertainty, thus further dampening investment. In sum, the Commission should not veer from its broadband unbundling policies, which have worked well and have been explicitly upheld on appeal.

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**REPLY COMMENTS OF CIENA CORPORATION**

The Broadband Group of CIENA Corporation (“CIENA”), formerly Catena Networks, Inc., hereby replies to some of the comments submitted in response to the Commission’s Further Notice of Proposed Rulemaking on incumbent carriers’ unbundling obligations.<sup>1</sup> As CIENA indicated in its initial comments, the Commission’s decision to reduce or eliminate unbundling obligations on incumbent carriers’ broadband facilities is well serving the public interest by fostering the deployment of advanced services. CIENA thus urged the Commission not to retreat from that policy choice.

A very small number of commenting parties, in contrast, urged the Commission to reverse course and to re-impose unbundling obligations for the high frequency portion of a loop (so-called line sharing) or for hybrid loops. Three commenting parties requested that the

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<sup>1</sup> *Unbundled Access to Network Elements*, WC Docket No. 04-313, FCC 04-179, released August 20, 2004, *Federal Register* Vol. 69 at p. 55128 (September 13, 2004).

Commission reinstate line sharing – EarthLink, Inc. (“EarthLink”), Covad Communications Company (“Covad”), and the Association for Local Telecommunications Services and some of its member companies (“ALTS”).<sup>2</sup> Covad additionally requested access to legacy hybrid loops.<sup>3</sup> As detailed below, the Commission should reject these pleas for the re-imposition of unbundling obligations, because they have raised no valid basis for overturning the Commission’s decision not to burden these broadband facilities with unbundling obligations – a determination that was explicitly upheld by the Court of Appeals.<sup>4</sup> Moreover, any such abrupt reversal in Commission policy would undoubtedly engender litigation and create uncertainty, and thereby put a damper on investment in advanced technologies.

## **I. The Commission Should Reject Calls to Re-Impose Line Sharing**

### **A. The Absence of Impairment**

In seeking the reinstatement of line sharing, the competitive carriers assert that requesting carriers are impaired without access to the high frequency portion of a copper loop.<sup>5</sup> Without impairment, of course, there can be no obligation for unbundling.<sup>6</sup> The competitive carriers’

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<sup>2</sup> See EarthLink Comments at pp. 2-10; Covad Comments at pp. 40-56; and ALTS Comments at pp. 46-52. In addition to these three commenters, Comptel/Ascent mentioned line sharing at pp. 6 and 10 of its *ex parte* submission in this proceeding, filed October 13, 2004, but did not raise the issue in its comments filed on October 4, 2004. The New Jersey Division of the Ratepayer Advocate, at p. 25 of its comments, also casually urged the Commission to revisit line sharing, but provided nothing in the way of support for this bare request.

<sup>3</sup> See Covad Comments at pp. 56-60.

<sup>4</sup> *USTA v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004) (“*USTA I*”).

<sup>5</sup> Covad Comments at pp. 41-46; ALTS Comments at pp. 46.

<sup>6</sup> E.g., *USTA II*, 359 F.3d at p. 561.

argument assumes that competitors in general are impaired without access to loops, and because the high frequency portion of the loop is subject to the same fixed costs and economies of scale as the whole loops, impairment for the high frequency portion of the loop can be presumed. Among other things, this overly simplistic analysis fails to focus on the proper comparison.

As the Commission correctly held, and as subsequent developments reinforce, the question is not simply whether a competitor can replicate the incumbent carrier's loop plant, but rather whether the competitive carrier can economically enter the market with access to a "whole" loop, but without access to just the high frequency portion of a loop. In the *Triennial Review Order* the Commission found that competitive carriers were not impaired without access to line sharing, because they had the alternative of line-splitting with access to the "whole" copper loop as an unbundled network element ("UNE").<sup>7</sup> Line-splitting allows a carrier to provide the subscriber with both voice and broadband service, a bundle alleged to be critical. The Commission additionally found no impairment by examining the availability of alternative technologies outside of the incumbent's network, including cable modems, wireless, satellite and broadband over power lines ("BPL").<sup>8</sup> Indeed, cable modem service was (and remains) the

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<sup>7</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) at ¶¶ 255-261, *vacated and remanded in part*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

<sup>8</sup> *Id.* at ¶¶ 262-263. CIENA finds it somewhat hypocritical that Covad denigrates the availability of BPL and wireless due to the lack of widespread deployment presently, *e.g.*, Covad Comments at pp. 2 and 28 (although in fact there have been commercial deployments of these technologies), while at the same time asking the Commission to give credence to its innovative "line powered voice capability" VoIP service, which Covad will "trial in select cities next year." *Id.* at p. 37.

predominant broadband access technology.<sup>9</sup> Those determinations were challenged on appeal, but were upheld in the *USTA II* decision.<sup>10</sup>

Developments subsequent to the *Triennial Review Order* validate these determinations. Although EarthLink asserts that line splitting is not viable,<sup>11</sup> Covad has in fact entered into numerous line-splitting deals since release of the *Triennial Review Order*.<sup>12</sup> In its comments in this proceeding, Covad also claims that line-splitting is only available to the 5% of the market served by competitive carriers, leaving 95% of the market unaddressed.<sup>13</sup> Covad ignores the fact that line-splitting is an alternative on any copper loop, not simply the loops where the competitive voice carrier had already captured the customer.<sup>14</sup> Presumably that was the purpose

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<sup>9</sup> See, UNE Fact Report 2004, submitted by BellSouth, SBC, Qwest and Verizon, October, 2004 at pp. A-1 to A-7 (hereafter cited as “UNE Fact Report 2004”).

<sup>10</sup> *USTA II*, 359 F.3d at pp 584-85.

<sup>11</sup> EarthLink Comments at p. 6.

<sup>12</sup> E.g., Press Release, “Covad Extends Partnership with MCI” (September 2, 2003)([http://www.covad.com/companyinfo/pressroom/pr\\_2003/090203\\_press.shtml](http://www.covad.com/companyinfo/pressroom/pr_2003/090203_press.shtml)); Press Release, “Covad Partners with AT&T to Offer Bundled DSL and Voice Services in Four More States” (September 11, 2003) ([http://www.covad.com/companyinfo/pressroom/pr\\_2003/091103\\_press.shtml](http://www.covad.com/companyinfo/pressroom/pr_2003/091103_press.shtml)); TelephonyOnline.com, “Covad signs line-splitting deal with Z-Tel” (August 7, 2003) ([http://telephonyonline.com/ar/telecom\\_covad\\_signs\\_linesplitting/](http://telephonyonline.com/ar/telecom_covad_signs_linesplitting/)). Indeed, Covad indicated it has expanded its dealings with EarthLink to cover 65 new markets. “Covad Partners with Earthlink to Expand Small Office DSL Service to 65 New Markets,” Press Release (October 20, 2003) ([http://www.covad.com/companyinfo/pressroom/pr\\_2003/102003\\_press.shtml](http://www.covad.com/companyinfo/pressroom/pr_2003/102003_press.shtml)).

<sup>13</sup> Covad Comments at p. 43.

<sup>14</sup> ALTS makes a similar error in claiming that voice over Internet Protocol (“VoIP”) is only an option for the 24.6% of households that currently subscribe to broadband service. The proper analysis is to examine the households where broadband service is readily available, not  
(continued on next page)



of Covad's entering into business deals with the various competitive voice providers, so that both Covad and the voice carrier could expand their customer base.

While Covad now also claims that the elimination of UNE-P renders its line-splitting deals as no longer viable,<sup>15</sup> the widespread availability of VoIP services means that a competitive broadband provider can provide the critical voice and broadband package, even without a separate voice offering using the low-frequency portion of the copper loop. Indeed, Covad touts its planned VoIP services as superior to traditional voice services, and claims that VoIP is supplanting "nearly obsolete Class 5 switches."<sup>16</sup> In its initial comments in this proceeding, CIENA cited a number of examples of VoIP providers teaming with broadband service providers to offer a voice-broadband package,<sup>17</sup> and new deals continue to be announced.<sup>18</sup> In addition to this anecdotal information, the UNE Fact Report 2004 provides detailed information on the widespread availability of VoIP offerings.<sup>19</sup>

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just households that have already subscribed. According to the UNE Fact Report 2004, some 87% of U.S. households have access to cable modem service. UNE Fact Report 2004 at I-2.

<sup>15</sup> Covad Comments at p. 43. Such a claim assumes that competitive carriers cannot self-provision switching capability, an assumption belied by the fact that some 1,200 CLEC circuit switches have already been deployed. UNE Fact Report 2004 at p. I-2.

<sup>16</sup> Covad Comments at pp. 18-22 and 32-33.

<sup>17</sup> CIENA Comments at n. 27.

<sup>18</sup> *E.g.*, *Dow Jones Newswire*, October 13, 2004, "Net2Phone in VOIP Partnership With Cable Cooperative" (Net2Phone announced a partnership as a preferred vendor for the National Cable Television Cooperative).

<sup>19</sup> UNE Fact Report 2004 at pp. II-2 to II-27 and Appendix C.

Although Covad and ALTS attempt to disparage VoIP as a valid alternative, claiming that customers will only be satisfied with ILEC voice services,<sup>20</sup> those assertions are belied by the fact that significant inroads to the ILECs' voice services have already been achieved by VoIP providers, voice services provided over cable facilities and wireless service providers.<sup>21</sup> Indeed, Covad in its comments in this proceeding touts the superiority of its VoIP services over ILEC voice offerings and other VoIP offerings.<sup>22</sup> In sum, competitive broadband providers can now offer the desired bundle of voice and broadband service, regardless of the alleged non-viability of line-splitting, so the Commission's previous non-impairment determination remains valid.<sup>23</sup>

## **B. Other Considerations**

In addition to the impairment analysis, the "at a minimum" provision of the Telecommunications Act of 1996 directs the Commission to consider other factors in deciding whether to require unbundling of particular network elements. One such factor evaluated by the Commission was the potential adverse impact on competition as a result of the inherently arbitrary nature of any cost allocation for the high- and low-frequency portions of the loop.<sup>24</sup>

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<sup>20</sup> Covad Comments at p. 42; ALTS Comments at p. 48.

<sup>21</sup> E.g., UNE Fact Report 2004 at pp. II-1 to II-42.

<sup>22</sup> Covad Comments at pp. 18-22.

<sup>23</sup> Moreover, to the extent the Commission should consider alternative ILEC offerings as part of its impairment analysis (*cf.*, *USTA II*, 359 F.3d at p. 577 (Commission's impairment analysis must consider the availability of tariffed special access services)), CIENA observes that Covad has entered into commercial agreements with three of the four RBOCs to allow the continued provision of line sharing. *See* CIENA Comments at n. 25.

<sup>24</sup> *Triennial Review Order* at ¶ 260. *See also*, *USTA II*, 359 F.3d at p. 584.

Covad attempts to skirt this intractable problem by offering the recurring rate agreed to in its agreement with Qwest as a benchmark, creating a ceiling of 11% of the recurring loop costs for standalone loops as calculated by Covad.<sup>25</sup> That calculation, however, includes an arbitrary “backing out” of OSS costs, and uses a rate that assumes certain volume commitments,<sup>26</sup> and thus itself is arbitrarily derived. Nor is there any demonstration that the Qwest “costs” are typical of other ILECs’ costs. Covad simply has not solved the cost allocation dilemma.

Covad additionally attempts to demonstrate that line sharing does not create the adverse impact on investment incentives found by the Commission by citing to experiences in foreign countries.<sup>27</sup> However, those anecdotal comparisons are invalid, insofar as Covad has failed to account for the impact of differing densities on broadband deployment in the other countries. Moreover, the U.S. market for broadband access, unlike those overseas, is dominated by cable modem service, making those comparisons meaningless. Indeed, CIENA’s experience of an increased demand for its DSL-capable products following the adoption of the *Triennial Review Order* confirms the investment disincentives that existed under the prior regime of unbundling and uncertainty.

Covad and ALTS also tout line sharing as a means of facilitating a transition for voice competition.<sup>28</sup> CIENA believes that to the extent there are any problems with voice competition

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<sup>25</sup> Covad Comments at pp. 45-46.

<sup>26</sup> Covad Comments Attachment at pp. 17-21.

<sup>27</sup> Covad Comments at pp. 46-50.

<sup>28</sup> Covad Comments at pp. 50-54; ALTS Comments at pp. 49-50.

because of “hot cuts,” those problems should be addressed directly. The Commission should not permanently impose line sharing, with its attendant drawbacks and investment disincentives, to provide what may be at best an indirect solution to an unrelated potential transitory problem.

Covad, ALTS and EarthLink all claim that the *USTA II* decision does not *compel* the Commission to stick with its decision to eliminate line sharing as a UNE.<sup>29</sup> The Court of Appeals in the *USTA II* opinion, however, explicitly considered and rejected the challenges repeated here to the Commission’s decision to eliminate line sharing. Moreover, these pleas to alter that policy ignore the obligation of the Commission to provide a reasoned basis for any reversal of policy, particularly in the abrupt manner requested by Covad, ALTS and EarthLink.<sup>30</sup> As demonstrated above, the developments subsequent to the adoption of the *Triennial Review Order* reinforce the basis for eliminating line sharing as a UNE, so that any reversal would be arbitrary and capricious. Moreover, such a sudden reversal in Commission policy would surely be challenged, creating wasteful and harmful confusion that itself would dampen investment.

Finally, EarthLink argues that a majority of the current Commissioners actually favor line sharing (notwithstanding their votes in the *Triennial Review Order*).<sup>31</sup> While some of the

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<sup>29</sup> Covad Comments at p. 54-56; ALTS Comments at pp. 51-52; EarthLink Comments at p. 10.

<sup>30</sup> E.g., *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C.Cir. 1987): “It is axiomatic that an agency choosing to alter its regulatory course “must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored,” citing *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971); *accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).”.

<sup>31</sup> EarthLink Comments at pp. 2-4.

Commissioners have expressed individual opinions that there may have been some positive attributes to line sharing (and two of the Commissioners expressed a willingness to re-examine line sharing), both the *Triennial Review Order* and *USTA II* explicitly found that the negative aspects of line sharing,<sup>32</sup> combined with the absence of impairment, justified elimination of line sharing as a UNE. Moreover, the record since the adoption of the *Triennial Review Order* even more forcefully compels elimination of line sharing as a UNE, and any reversal of that decision would create additional problems. Thus, EarthLink's belated attempt to "re-count" the votes is unavailing.

## **II. The Commission Should Reject Covad's Request to Reinstate Access to Legacy Hybrid Loops as UNEs**

In addition to the requests for re-imposition of line sharing, Covad also seeks to have the Commission reinstate unbundling for legacy hybrid loops.<sup>33</sup> Covad contends that the incumbent carriers' previous deployment of fiber in a loop means that the elimination of investment disincentives is not a relevant consideration. However, Covad ignores the fact that the incumbent carrier must still make significant investments to upgrade the capability of those hybrid loops in order to provide advanced services. In upholding the Commission's decision to reduce unbundling for hybrid loops, the Court of Appeals explicitly recognized the impact of

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<sup>32</sup> CIENA discussed the negative effects on line sharing in its initial comments in this proceeding. See CIENA Comments at pp. 12-13. *See also*, Comments of Catena in CC Docket No. 98-147, filed December 12, 2000 at pp. 12-19. For the convenience of the Commission, those pages are included in this pleading as Attachment 1.

<sup>33</sup> Covad Comments at pp. 40 and 56-60.

unbundling on the investment incentives for these additional electronics.<sup>34</sup> Indeed, several of CIENA's products, including the CNX-5, CNX-100 and CN-1000, are designed to allow a carrier to upgrade its fiber-fed remote terminals so as to be able to provide DSL services to customers.<sup>35</sup> In light of the surge in demand for these products following elimination of the unbundling obligation in the *Triennial Review Order*, CIENA can attest to the dampening effect of unbundling on investment in the upgrades needed to provide advanced services for customers served by legacy hybrid loops,.

Moreover, if the Commission was to reverse course on hybrid loop unbundling abruptly, such a decision almost certainly would engender litigation and uncertainty, thus creating a cloud that would put a halt to any further investment by either incumbent carriers or competitive carriers.<sup>36</sup> The Commission has been charged with fostering the deployment of advanced services to all Americans, not merely the ones for whom it is economical to provide advanced services via deep fiber architectures. For this reason, too, the Commission should reject Covad's request.

## CONCLUSION

The Commission made the correct decision in the *Triennial Review Order* to reduce or eliminate the unbundling obligations for incumbent carriers' broadband facilities – a decision

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<sup>34</sup> *USTA II*, 359 F.3d at p. 581.

<sup>35</sup> In the case of the CNX-5, upgrades can be implemented on a line-by-line basis through the replacement of line cards in the legacy Lucent SLC-5 remote terminal. The CN-1000 and the CNX-100 use the same silicon technology in the CNX-5, and are appropriate for either central office or remote terminal use.

<sup>36</sup> *See* n. 30, *supra*.

that was upheld in *USTA II*. Covad, ALTS and EarthLink have failed to provide any valid basis in their comments in this proceeding to reverse that wise policy choice. WHEREFORE, the Commission should reject their requests to reinstate unbundling obligations for line sharing or legacy hybrid loops.

Respectfully submitted,

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